SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 8.

HUGH STEVENSON ET ALS.

vs.

WM. FAIN ET ALS.

Brief of Charles Seymour and Webb, McClung & Baker, Counsel for Appellants, upon the Question of Jurisdiction.

In the printed brief filed by the counsel for the appellees, on page 3, objections to the jurisdiction of the Supreme Court are stated as follows:

"*First.* The jurisdiction of the Federal courts in this cause is entirely dependent upon the fact that the opposite parties are citizens of different States. It involves no constitutional question, and under section 6 of the act of March 3rd, 1891, chapter 517, the decision of the United States circuit court of appeals is final and conclusive upon the parties.

"*Second.* Because the only question involved in this lawsuit is one of fact, namely: In what State are the lands in

dispute situated? * * * The United States circuit court at Knoxville and the United States circuit court of appeals at Cincinnati have concurred in the finding of fact that the lands in question are in North Carolina. * * *

"The lower courts having concurred in this finding of fact, we submit that this honorable court will not review the case on the facts, as there is abundance of evidence to support the decree of the lower courts."

I.

If the jurisdiction of the circuit court at Knoxville depended *entirely* upon diverse citizenship, then the decree of the court of appeals would, under the act of 1891, be final; but such jurisdiction does not depend *entirely* upon the diverse citizenship of the parties.

We must look to the bill filed in the circuit court to ascertain the grounds of jurisdiction.

1st. The bill avers that all of the complainants except Geo. Peabody Wetmore are citizens of the State of New York, and said Wetmore is a citizen of the State of Rhode Island, and that all of the defendants except Wm. Fain are citizens of the State of North Carolina, and said Fain is a citizen of the State of Georgia.

Printed Record, page 3.

This makes a case of jurisdiction on the ground of diverse citizenship.

2d. It is also stated in the bill (Record, same page) that complainants claim the lands in controversy under grants from the State of Tennessee, and that the defendants claim

these lands under grants from the State of North Carolina, and that the title to said lands depends upon whether the lands lie in Tennessee or North Carolina, so that the location of the line between the two States is the issue in this case.

Record, page 4.

If the statement that the opposing parties claim the same lands under grants from different States and the location of the State line between the two States is the statement of a jurisdictional fact, then the jurisdiction of the circuit court did not depend *entirely* upon diverse citizenship, but upon both diverse citizenship and also upon a controversy between parties claiming lands under grants from different States.

No question of jurisdiction was made in the circuit court or in the circuit court of appeals, so that it does not appear upon what ground those courts assumed jurisdiction.

It is claimed by the appellees that this controversy between complainants and defendants claiming lands under grants from different States is not within the jurisdiction of the circuit court, because the complainants and defendants are not "citizens of the same State."

This claim is founded upon article III, section 2, of the constitution, and section 1 of the act, August 13, 1888, chapter 866, of the Acts 1887–1888.

The constitutional provision is as follows:

"The judicial power shall extend to all cases in law and "equity arising under this constitution, the laws of the "United States, and treaties made, or which shall be made, "under their authority; to all cases affecting ambassadors, "other public ministers and consuls; to all cases of admi- "ralty and maritime jurisdiction; to controversies to which

"the United States shall be a party; to controversies be-
"tween two or more States; between a State and citizens of
"another State; between citizens of different States; be-
"tween citizens of the same State claiming lands under
"grants of different States." * * *

The statute of August 13, 1888, so far as it affects the question under consideration, is the same as the constitution. Both use the same language, to wit, "between citizens of the same State claiming lands under grants of different States."

Appellees construe this provision that the circuit court has no jurisdiction of a controversy between persons claiming lands under grants of different States, *unless* such persons are citizens of the same State.

We construe it that the circuit court has jurisdiction of such a controversy, *even though* or *notwithstanding* such persons are citizens of the same State.

It will be observed that two classes of jurisdiction are provided for, one depending upon the subject-matter and the other upon citizenship and status, but both classes applying to subjects peculiarly appropriate for Federal decision and not appropriate for State decision. It was not deemed proper that a controversy between two States should be left to the decision of a State court, or that a controversy between a State and citizens of another State should be left to the decision of a State, or that a controversy between citizens of different States should be left to the decision of a State court; but no provision is made for extending the judicial power to general controversies between citizens of the same State. It was deemed proper that citizens of the same State

should submit their controversies to their own courts and accept their decisions, unless some Federal question was involved, which should be paramount to the question of citizenship.

In the clause extending the judicial power to controversies "between citizens of the same State claiming lands under grants of different States" we assume that the paramount intention was not to extend the judicial power to controversies between citizens of the same State, but to extend it to the subject-matter of claims to lands under grants from different States, without reference to the citizenship of the claimants, but as the preceding clause had limited the judicial power to controversies between citizens of different States the next clause extending the judicial power to controversies between claimants to lands under grants of different States might have been construed to be also limited to controversies in which the claimants were citizens of different States, unless it should be expressly shown that citizens of the same State were also included. Hence it was intended to *extend* the judicial power in such controversies to citizens of the same State, and not to *limit* it to them.

If it shall be held that jurisdiction in controversies between claimants of lands under grants of different States is limited to citizens of the same State and does not apply to citizens of different States, then the paramount purpose of this provision to extend the judicial power to the subject-matter will be defeated.

If some of the complainants should be citizens of the same State with the defendants and some should be citizens of different States, then the Federal court could not take juris-

diction on account of diverse citizenship, and so could not take jurisdiction at all.

The Articles of Confederation of 1778 seem to bear out our construction and to show a purpose to retain Federal control of this question.

Article IX, section 2, reserves the right in Congress to settle all disputes between States concerning boundary, jurisdiction, &c., and provides that Congress shall appoint a court to hear and determine the dispute.

Section 3 of the same article provides that "all controversies concerning the private right of soil claimed under different grants of two or more States" shall be settled in the same way.

We have been able to find only two decisions on this subject.

In *Colson et als. vs. Lewis*, 2 Wheaton, 377, the parties claimed lands under grants of different States and the court sustained the jurisdiction. The suit was in the circuit court of Kentucky and the lands were in Kentucky. The complainants were citizens of Virginia, but the citizenship of the defendants does not appear.

In the *Town of Pawlet vs. Clark*, 9 Cranch, 292, the same question was involved and the court took jurisdiction, but the citizenship of the parties did not appear.

We suggest, further, that this court would have jurisdiction of this controversy if the two States of Tennessee and North Carolina were the parties, and is the only authority which would be competent to settle such a controversy. While these two States are not parties to this cause, still they are vitally interested in the settlement of the question of the

boundary line between them, and would not be willing to accept the decision of any court other than this honorable court. If the decision of the circuit court of appeals shall be held to be final, it will invite a suit between the States to secure an adjudication from this court on the boundary. If in such a suit this court should come to a conclusion different from the circuit court of appeals and declare that the land in dispute lies in Tennessee, we would have a final decree of the circuit court of appeals decreeing title in defendants to land in Tennessee under grants from North Carolina.

II.

Does the concurrence of the circuit court and the circuit court of appeals deprive this court of jurisdiction?

We concede that ordinarily such concurrent finding would be strongly persuasive, and that this court would not be disposed to review the facts after such concurrent finding in ordinary controversies over private rights between individuals, but such concurrent finding is not binding on this court in any case, and in a matter of such public importance as the settlement of several miles of boundary between two States it could have no effect to prevent this court from reviewing the facts.

The latest expression from this honorable court on that subject is in *Schwartz vs. Dues*, 187 U. S., 26, where the master, the circuit court, and the circuit court of appeals all concurred in a finding of facts. This court said it did "not feel disposed to review." This is far from declaring that the court has no jurisdiction to review.

If we are correct in our assumption that the controversy between claimants of lands under grants of different States is a ground of jurisdiction independently of citizenship, then the decision of the court of appeals is not final.

N. P. R'way Co. vs. Harris, 158 U. S., 326.

N. P. R'way Co. vs. Soderberg, 188 U. S., 528.

F. S. Webb, Counsel.

Chas. Heyman, Counsel

No. 8.

[redacted]

v.

[redacted]

List of Illegal Practices by the Court, &c., on Behalf of Appellants Showing Suppression of State Law as Claimed by Appellants.

[redacted]

[redacted]

T. S. Wren,
Of Counsel.

John F. Donovan, Printer, Washington, D. C. [redacted]

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List of Maps Directed by the Court to be Filed on Behalf of Appellants Showing Recognition of the State Line as Claimed by Appellants.

Tennessee-North Carolina State Line Case.

MAPS IN THE ENGINEER OFFICE, WAR DEPARTMENT, WASHINGTON, D. C.

Military map of Kentucky and Tennessee, 1865.

Original map of the Cherokee country in North Carolina, surveyed in 1837. (Shows that the State line follows the water divide.)

Original map of part of Cherokee Territory, North Carolina, and Tennessee, by Capt. W. G. Williams, U. S. Engineers; 1837–'8.

Lucas's map of Tennessee. 1823. Compiled by the U. S. Topographic Engineers.

Map of East Tennessee. Captain Poe, U. S. Engineers.

Original map by Col. W. E. Merrill, U. S. Engineers. 1865.

Original map by Ed. Ruger, Chief Topographical Engineer Office, Nashville. Prepared to show the campaigns of the Army of the Cumberland. By order of General G. H. Thomas, about 1868.

List of Maps, Atlases, and Books Sent to be Used in Connection with the Tennessee-North Carolina Boundary Case.

Hinton. Tennessee, 1831. Map.

Colton. Tennessee, 1861. Map.

Hinton (J. H. ed.). The History and Topography of the United States. London, 1842.

Van Horn (T. B.). History of the Army of the Cumberland. 8°. Atlas. Cincinnati, 1875.

Mountain region of North Carolina and Tennessee, 1863. Compiled by W. L. Nicholson. Map.

North Carolina and South Carolina, etc., 1861. J. H. Colton.

Mitchell. North Carolina, South Carolina, 1832.

Hazard (W. P.). Southern States (railroad and military map of the), 1862.

Tanner. Tennessee, 1830. Map.

Morse (J.). A new and elegant general atlas comprising all the new discoveries. 4°. Boston, Thomas & Andrews, 1812.

A new and elegant general atlas. Boston, 1819.

A new American atlas. Philadelphia, 1826.

Morse's North American atlas. New York, 1842.

Maps of the Society for diffusion of useful knowledge. London, 1844.

A complete historical American atlas. Philadelphia, H. C. Carey & I. Lea, 1822.

Carey's general atlas, improved and enlarged. Philadelphia, 1818.

A new American atlas, by Henry S. Tanner. Philadelphia, H. S. Tanner, 1823.

A new American atlas, by H. S. Tanner. Philadelphia, H. S. Tanner [1839].

List of Maps Requested for Use in the Supreme Court of the United States by Letter of the Clerk of the Court, Dated October 11, 1904 (53028).

Military map of Kentucky and Tennessee. (One sheet; marked T 68, Book No. 2.)

A map of the Cherokee country in North Carolina surveyed in the year 1837. Drawn from the returns of deputy surveyors by R. Deaver. (One sheet; marked H 41, Roll No. 1.)

Map of part of the Cherokee Territory situated among the mountains of North Carolina, Georgia, and Tennessee, from surveys under the direction of W. G. Williams, captain United States topographical engineers in 1837 and 1838. (One sheet; marked U. S. 125, Roll 1.)

Map of the State of Tennessee, drawn from the best authorities by *F.* Lucas, *Jr.* (One sheet; marked U. S. No. 49.)

Map of East Tennessee, prepared under the direction of Capt. O. M. Poe, corps of engineers and chief engineer military division of the Mississippi, from data furnished principally by Capt. O. M. Poe and Prof. Jas. M. Safford, 1864. (One sheet; marked T 87, Roll No. 1.)

Military map of Middle Tennessee and parts of East Tennessee and of adjoining States, being part of the department of the Cumberland, commanded by Major General Geo. H. Thomas, U. S. A. Compiled and drawn under the direction of Colonel Wm. E. Merrill, 1st U. S. V. V. engineers, captain corps of engineers and chief engineer department, Cumberland, with the assistance of Prof. J. M. Safford, late State geologist of Tennessee, by C. S. Morgell, assistant engineer. (One sheet; marked T 84, Long Roll.)

Map prepared to exhibit the campaigns in which the Army of the Cumberland took part during the war of the rebellion, by order of Major Gen. George H. Thomas, U. S. A., compiled under the direction of Brevet Major Gen. Z. B. Tower, chief engineer, military division of the Tennessee; by Ed. Ruger, supt. top'l eng'r office at Nashville. Assistants: Capt. A. Kilp and Lieut. R. Flach, 3d U. S. C. A. (heavy) and assistant top'l eng'rs. (Four sheets; marked U. S. 275 Flat, No. 1.)

Respectfully submitted.

CHARLES SEYMOUR, *Counsel.*

T. S. WEBB,
Of Counsel.